



September 23, 2010

SECRETARIAL DECISION MEMORANDUM

By this memorandum, I am putting in place a process to consider exercising my authority to modify or remit penalties assessed in specific cases identified by the Department of Commerce Inspector General (IG) in its thorough investigation of complaints regarding the National Oceanographic & Atmospheric Administration (NOAA) Office of Law Enforcement (OLE) and Office of General Counsel for Enforcement and Litigation (GCEL).

The most recent IG report (the September 2010 Report) identified certain cases it found would benefit from "an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria." I am appointing a Special Master to review certain complaints received by the IG and make recommendations as to whether I should modify or remit any of the penalties. I am also directing NOAA leadership to take action to address other issues the IG identified that do not lend themselves to individual case-by-case remedies.

New leadership at OLE and GCEL has already acted to increase transparency and accountability in their respective offices and to reinforce the high standards of professional and ethical conduct adhered to by most law enforcement professionals who work there. I undertake this action to help our new leadership wipe the slate clean of past practices identified by the Inspector General that are incompatible with these high standards and with the standards I expect of law enforcement officers.

The IG Investigation.

The Inspector General's investigation into the policies and practices of OLE and GCEL began in June 2009 at the request of Dr. Jane Lubchenco, the Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator. As

part of this investigation, the IG reached out to people from all over the country by announcing its investigation and posting a notice on the Office of Inspector General website with a link to a dedicated email address; the IG also sent investigators to visit various fishing communities, where the fact of the investigation attracted notice in local press.

NOAA's Office of Law Enforcement investigates more than 5,000 incidents per year, and refers roughly 400 cases per year to GCEL for enforcement action. Although the IG's investigation found that complaints about NOAA's enforcement practices are "not widespread," it received 131 different complaints from fishermen, dealers, and various other representatives about action they believed represented unfair treatment or overzealous enforcement by OLE or GCEL employees. In his January 2010 report, the IG presented examples of 11 of these complaints and stated it was "in the process of examining these complaints and the corresponding enforcement case files to determine whether any additional action is necessary or recommended, either by [the IG] or by NOAA." The great majority of these complaints arose from NOAA's Northeast Region.

The September 2010 Report presents the results of this further investigation into the 11 examples and additional complaints it identified. The report discusses 27 complaints that represent the most serious issues and concerns raised, in which the IG identified instances of (1) "overzealous or abusive conduct" stemming from broad and powerful enforcement authorities; (2) enforcement process that are "arbitrary, untimely and lack transparency;" and (3) "unduly complicated, unclear, and confusing fishing regulations." With respect to 19 of these complaints, the IG recommends some further action by NOAA. In some of these instances, suitable action could consist of review to assess whether additional training, personnel action, or other administrative measures are warranted, but the report identifies certain complaints as suitable for review of the outcome of the enforcement action.

The Appropriateness of Secretarial Action.

All of the complaints identified for review in the September 2010 Report arise from action taken under the Magnuson-Stevens Fishery Conservation and Management Act (Act). Under Section 308(e) of this Act, I have the authority to "compromise, modify or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section." The plain language of this statute allows modification or remission of the amount of any civil penalty imposed under the Act at any time, including after the penalty is imposed, on my own initiative.

I do not undertake exercise of this authority lightly. Enforcement is a vital part of NOAA's fisheries management program. Indeed, the IG's January 2010 Report noted that numerous interviewees "supported enforcement, provided that it is fair, equitable, and not onerous" and "expressed strong support for enforcement against what they believe is a minority of unscrupulous operators who intentionally violate the law and place the industry at risk by compromising the viability of the nation's fisheries."

Furthermore, finality is an essential tenet of the US legal system. Once the legal process has run its course, the opportunity to re-open cases is rarely available and is reserved for serious miscarriages of justice. The complainants identified by the IG had legal remedies available to them at the time, including the opportunity to request a hearing before an administrative law judge and, if they were dissatisfied with the decision at that level, to seek further review by the NOAA Administrator or a federal court. A significant number of the complainants were represented by counsel, who could be expected to provide a shield against any overzealous law enforcement officer or attorney.

To establish a new direction moving forward, Under Secretary Jane Lubchenco and I have appointed new leadership to oversee NOAA law enforcement. Eric Schwaab as Assistant Administrator for Fisheries and Lois Schiffer as General Counsel of NOAA have already revised the reporting structure to ensure that all charges brought and all cases resolved by officers and lawyers in the field are approved by agency management and are consistent with NOAA policies. They are establishing new criteria for both assessing penalties and settling cases that will strengthen accountability of officers and lawyers and increase transparency for affected stakeholders. They are developing approaches consistent with their resources to provide prompt case review. Ms. Schiffer recently named a new Assistant General Counsel for Enforcement and Litigation, Benjamin Friedman, a veteran Department of Justice prosecutor who will strengthen the enforcement leadership team.

This new leadership and focus will reinforce transparency, consistency, and responsiveness in NOAA's enforcement programs. Numerous speakers at NOAA's National Enforcement Summit in August 2010, expressed NOAA's and DOC's intention to promote transparency and the rule of law in the fisheries management program so as to improve community understanding of fisheries regulation and overall compliance with regulations to protect and rebuild fish stocks. This forward-looking approach is critical to ensuring a fair and effective enforcement program.

Despite these important considerations and steps forward, I have concluded it is necessary to take action to review certain cases identified by the IG in order to

make clear that conduct by law enforcement officers and attorneys that oversteps the bounds of propriety and fairness expected of them is not part of NOAA's law enforcement program. The perception that enforcement is arbitrary and abusive undermines the acceptance of NOAA's enforcement of fisheries laws and the recognition of effective enforcement as a valuable tool for promoting sustainable fisheries.

Appointment of Special Master.

Therefore I am appointing the Honorable Charles B. Swartwood, III as a Special Master to review and evaluate the cases identified by the IG in his September 2010 Report as warranting further review of the enforcement act and to recommend appropriate action to me. I delegate Judge Swartwood the authority granted to me by Section 308(e) of the Magnuson-Stevens Action to review cases brought under that Act, but retain the ultimate authority and discretion to make determinations based on the Special Master's recommendations regarding whether any penalties should be modified or remitted.

Judge Swartwood served amicably as a United States Magistrate Judge for the District of Massachusetts for twelve years and currently serves as Chairman of the Massachusetts State Ethics Commission. He was appointed, as a trial lawyer, by the Massachusetts Supreme Court to investigate and report on allegations of judicial misconduct. In appointing him to the Ethics Commission, Massachusetts Governor Deval Patrick said, "Judge Swartwood is widely respected for his understanding of the law and his common sense approach to resolving legal matters" and noted that he has "a wealth of experience and a strong sense of fairness." Judge Swartwood will bring the same qualities to this review.

In determining which matters should be referred to me, the Special Master is directed to identify those instances in which clear and convincing evidence establishes that NOAA enforcement personnel engaged in conduct that overstepped the bounds of propriety and fairness expected of them,¹ and had a material impact on the outcome of the case. Examples of such conduct may include:

- (a) Abuse of process, including vindictive prosecution or other prosecution in bad faith, and unreasonable delay that prejudices the defense of the case;
- (b) Abusive conduct that amounts to coercion, intimidation, or outrageous behavior; and

¹ This language is taken from the seminal definition of prosecutorial misconduct in *Berger v. United States*, 295 U.S. 78 (1935).

- (c) Presenting false or misleading evidence or other conduct that impacts the truth of the case presented.

In making a recommendation for modification or remission of any penalty, the Special Master may consider the seriousness of the conduct engaged in by any NOAA personnel, the impact of that conduct on the outcome of the case, the amount of the penalty assessed, any relief previously afforded for the penalty assessment or opportunities to seek relief, the factors enumerated in Section 308(a) of the Magnuson-Stevens Act and regulations thereunder as well as any other factors he deems appropriate for determining the amount of a penalty under the Act.

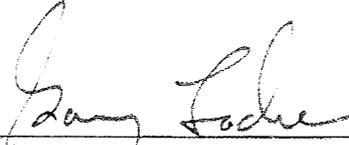
This review will focus on the cases that the IG's September 2010 Report indicated would benefit from further review of the enforcement action. In addition, to insure that this review encompasses as many cases as possible that may have been affected by conduct outside the bounds of propriety and fairness, Judge Swartwood is directed to consider whether any of the other 104 complaints brought to the attention of the IG that were not discussed in the September 2010 Report warrant further review. These would include:

- (a) Cases otherwise appropriate for review under these criteria in which the complainant declined to waive confidentiality in order to participate in the IG's investigation but now is prepared to do so;
- (b) Cases in which GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement; or
- (c) Cases handled by a GCEL attorney in which conduct of the kind specifically enumerated in the IG's September 2010 Report prejudiced the outcome of the case.

For the cases the Special Master identifies as being appropriate for further investigation, he shall review the cases files maintained by NOAA and the Office of Inspector General and conduct such other interviews and investigation as he sees fit. NOAA personnel are directed to be available to meet with him (or members of his staff) to discuss the complaints he is investigating upon reasonable notice. The Special Master may hire staff to support him and all reasonable expenses associated with the review and investigations will be funded from the Asset Forfeiture Fund, subject to the approval of the General Counsel of the Department of Commerce.

The Special Master will provide a report to me regarding his progress 60 days after his appointment and every 45 days thereafter until the review is concluded by four months from the time of his appointment. His final report shall fully detail the process used to review each case and summarize his findings regarding each case.

His recommendation for relief in any case should outline the basis for the particular recommendation as well as any amount by which he recommends the penalty be modified or remitted.

A handwritten signature in cursive script, appearing to read "Gary Locke".

Secretary Gary Locke